CANADIAN Taxpayers FEDERATION *Fighting for taxpayers*

THE TAXPAYER

Centre for Aboriginal Policy Change Special Edition 2003-2004

WILL the SUPREME COURT UPHOLD TAX EQUALITY VICTORY?

by Tanis Fiss
Director of the CTF's Centre for Aboriginal Policy Change

On June 11, 2003 the Federal Court of Appeal overturned the monumental lower court decision that ruled descendants of Treaty 8 Indians do not have to pay any tax at any time for any reason, regardless of where in Canada they live. This was a great victory for all taxpayers. Income – not race or ancestry – should be the only valid basis for a tax exemption.

In his trial decision, Justice Campbell ruled that federal government treaty commissioners did not promise the Indians a tax exemption in 1899. Campbell ruled that Treaty 8 Indians *believed* they had been promised a tax exemption, even though it wasn't included in the written text. He further ruled that the federal government must assume responsibility for the misunderstanding that arose. On that basis, he declared that descendants of the Treaty 8 Indians do not have to pay any tax at any time for any reason.

> *"Campbell's desire to be sensitive to the oral history provided by witnesses had crossed the boundary and amounted to an abandonment of the rules of evidence. The evidence is, at best, ambiguous and inconclusive, and in my view, can only be described as sparse, doubtful and equivocal."*
>
> *Judge Marc Nadon of the Federal Court Appeal commenting on Justice Doug Campbell's original decision, which granted tax exemption to Treaty 8 Indians.*

Fortunately for taxpayers, the Federal Court of Appeal didn't see it that way. In fact, in *Benoit v. Canada*, the Federal Court of Appeal accuses Justice Campbell of a "complete abandonment of the rules of evidence".

The trial judge excluded relevant evidence and based his decision on evidence that is "sparse, doubtful and equivocal".

For example, the trial judge excluded from evidence over one hundred transcripts of taped interviews of aboriginal elders conducted in the 1970s, in which the elders made no mention of taxation. Only the transcript of one interview, that with Cree elder Jean-Marie Mustus, who did mention tax, was admitted into evidence as relevant.

The Court of Appeal notes that the silence of over one hundred elders regarding taxation suggests that they were never promised an exemption from it. The trial judge should have admitted all of – or none of – these transcripts into evidence.

The Federal Court of Appeal's decision is a relief for taxpayers. However, the judicial process may not be over. Treaty 8 plaintiffs said they will appeal to the Supreme Court of Canada. Should the Supreme Court of Canada decide to hear the case, the Canadian Taxpayers Federation will seek leave once again to act as an intervenor due to the huge national implications of the case.

For example, some Indian leaders maintain that the descendants of Treaties 1 through 11, signed from 1871 to 1923, should all benefit from the same court ruling to be exempt from taxation. Obviously this would have a considerable impact on federal and provincial tax revenues, with other Canadians being forced to pay more tax. Indeed, seven weeks after the trial judgment in 2002 the Federal Court of Appeal ordered a stay, warning of irreparable harm. The trial judgment was suspended as it "could result in chaos to tax administration, and possible harm to business competitors of those entitled to a supply of tax-free goods."

Furthermore, several of the 35,000 native people affected by the Treaty 8 decision expect to be reimbursed for taxes they and their ancestors have paid over the past century. The cost of a reimbursement for back taxes could amount to tens, even hundreds of millions of dollars if one considers 100 years of taxes paid in today's dollars plus interest.

The CTF intervened at trial and again on appeal to argue that a race-based tax exemption would violate numerous international treaties and conventions against racism, not to mention basic principles of fairness. In light of the fact that treaty rights are acquired and exercised on the basis of ancestry, this would be a step backwards in the progress of human civilization, which has been towards equal individual rights for all citizens. For years the CTF has advocated lower taxes as a way to spur economic growth and to create prosperity for all. But the CTF opposes tax reductions or exemptions which are applied only to one group, at the expense of other Canadians.■

Tax immunity battle will go to Supreme Court, native leaders insist

Lower court strikes down rights to sweeping exemptions — some based on oral histories

BY NORMA GREENAWAY and DAVID HOWELL
CANWEST NEWS SERVICE

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THE LOST CENTURY

MOVING ABORIGINAL POLICY FROM THE 19th CENTURY TO THE 21st CENTURY

In March 2002, the CTF opened the Centre for Aboriginal Policy Change (the Centre). For years, the CTF blazed a trail challenging conventional wisdom concerning Aboriginal policy, and building the case for change.

However, we soon realized that we were only scratching the surface of this important issue, and were often haphazardly jumping from one issue to the next. The creation of the Centre was a recognition of the need to proactively coordinate our various aboriginal-related research and advocacy efforts under one umbrella.

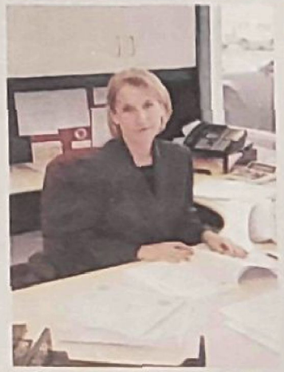
The Centre is not only a CTF first, but a Canadian first: a full-time, permanent, and professional advocacy presence to monitor, research and provide alternatives to current aboriginal policy. This is done under the guiding principles of support for individual property rights, equality, self-sufficiency, and democratic and financial accountability.

One of the first tasks of the Centre was to develop a comprehensive position paper bringing work together the CTF has done since 1997. *The Lost Century – Moving Aboriginal Policy from the 19th Century to the 21st Century* was released November 14th, 2002.

What follows is a brief overview of the position paper's contents and its eight recommendations:

OVERVIEW

The current plight of Aboriginal people was created in 1867 when the Canadian Constitution gave the federal government explicit responsibility for "Indians and lands reserved for Indians," thereby precluding provinces from legislating for Indians. The myriad of programs available to any other citizen of a province are not available to Indians living on reserve land, so the federal government creates a separate layer of bureaucratic overlap. Consequently, the federal government – by having programs specifically for Indians – treats Indians differently than other Canadians.



"The Centre is not only a CTF first, but a Canadian first: a full-time, permanent, and professional advocacy presence to monitor, research and provide alternatives to current aboriginal policy."

Fortunately, there are no legal or constitutional barriers to ending federal jurisdiction over Indians, because Canada's Constitution does not require the federal government to legislate for Indians. Just because the federal government has sole jurisdiction does not mean it must exercise it. Therefore, the federal government can abolish the *Indian Act* and its policies of segregation at any time.

The federal government is slowly moving towards amending the existing *Indian Act*. In the summer of 2002, the federal government introduced three pieces of draft legislation: *First Nations Governance Act*, *Specific Claims Resolution Act*, and *First Nations Fiscal and Statistical Management Act*. The draft legislation will be subject to public debate and a series of reviews before passage. It is not likely the proposals will be proclaimed into law before Fall 2003. Thus, the federal government has an opportunity to stop ignoring the issue of private property rights, lack of accountability and the distorting effects that freedom from taxation provides for native Canadians living on reserves.

The position paper assumes that *all* Canadians are fundamentally alike. Therefore, all legislation and government policy must be based on fairness and equality – not race.■

RECOMMENDATIONS

Recommendation #1:
The Indian Act

Clearly, treating one group of Canadians differently – often with preferential treatment – is wrong both morally and intellectually.

To achieve equality for all Canadians, the *Indian Act* must be phased out over the next 20 years. By 2023 the *Indian Act* should no longer be part of the Canadian landscape.

CTF legal counsel John Carpay (right) handles media questions after presenting the CTF's case on Treaty 8 to the Federal Court of Appeal.

Recommendation #2:
Private Property Rights

Markets work best when property is privately owned. The land which comprises a reserve is owned by the Crown and is controlled collectively by the native band council, not by individuals.

If native communities are to become economically self-sustaining, the reserve land should be transferred to individual natives living on-reserve, and to band members living off-reserve. It will be up to natives themselves to decide if they want to transfer the land into a communal arrangement or allow for the property to be owned and managed individually.

Recommendation #3:
Tax Exemptions

The CTF strongly supports tax relief and tax reform for all Canadians. However, both must be based on the principle of fairness.

The tax exemption given to natives living and working on reserves is a provision of the *Indian Act*, not the Canadian Constitution. The *Indian Act*, like any other piece of legislation, can be amended and/or abolished at any time. At all levels of government, tax exemptions for natives should be phased out over a period of ten years.

Recommendation #4:
Accountability

Accountability on native reserves is lacking but there are ways to solve this problem. One option is to have native governments collect taxes (as opposed to receiving grants from the federal government) as other governments do through a variety of tax measures.

The payments currently transferred to native band councils should be re-directed to individuals. The money necessary for native governments could then be taxed back by the local native government.

Recommendation #5:
Independent Audits

Once the federal government transfers money (tax dollars) from federal departments to native band councils, the Auditor General of Canada no longer has the authority to audit how and where the money is spent.

A system of independent annual financial and operation audits of Indian bands should be implemented. Expansion of the current Auditor General's mandate to include native bands is imperative for improved accountability and transparency.

Recommendation #6:
Unequal Legal Rights and Entitlements

Section 89 of the *Indian Act* protects native property and assets located on reserves from any process of garnishee, execution or attachment for debts, damages and other obligations, including taxes, however justly due and owing.

If native reserves are to become economically viable within Canada, they must be subject to the same rules. The *Indian Act* must be changed to eliminate section 89 which shelters native property and assets located on reserves from any process of garnishee, execution or attachment for debts, damages and other obligations.

Recommendation #7:
Municipal-Type Governments

There are more than 600 native bands in Canada ranging in size from two members to over 17,000. Seventy-five percent of bands consist of less than 1,000 registered Indians. Almost half of the bands have fewer than 500 members.

Municipal-type governments successfully manage small communities all over Canada. This model should be implemented for native reserves rather than a constitutionally protected "third order" style of government.

Recommendation #8:
Votes for on-reserve, non-Aboriginals

If someone is a full-time resident of a municipality, voting rights are assumed – regardless of ethnicity. Under aboriginal governance, non-aboriginals living on reserves have no democratic right to participate in the local political community, even though they may pay property taxes to the local native band.

Non-natives living on reserves and paying taxes in their local communities must be granted the democratic right to participate in the local political community by being granted the right to vote. In addition to a right to vote, non-natives living on reserves must be given the opportunity to serve as elected representatives on band councils.

Conclusion

All legislation and government policy must be based on fairness and equality – not race. As former Prime Minister Trudeau once stated, "The time is now to decide whether the Indians will be a race apart in Canada or whether [they] will be Canadians of full status." In other words, the time for equality is now.■

Published by: The Canadian Taxpayers Federation
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RESIDENTIAL SCHOOL LAWSUITS:

AN EXPENSIVE NEW TWIST ON AN OLD CASE

In 1998 the federal government delivered a statement of reconciliation and apology to those people who experienced sexual and/or physical abuse while attending residential schools. This apology paved the way for an industry funded by taxpayers and fuelled by guilt.

Director Tanis Fiss and the Center for Aboriginal Policy Change were featured as part of the July 28th cover story in *Time Magazine*.

The federal government began to develop and administer residential schools in 1874 to meet legal obligations under the Indian Act. Given that Indian populations used to be small and scattered, residential schools were the most practical way to educate Indian children. As well, education bureaucrats wanted to emulate the best schools of the era in both Canada and Britain, and they were live-in institutions.

Listening to media reports one would think that every Native Canadian attended residential school. In fact, less than one in six natives attended a residential school. Although less reported, it is not uncommon to hear positive stories from former students. More often, however, their stories are overshadowed by claims of abuse.

To date, $47 million has been spent to settle 630 claims of physical and sexual abuse; and millions more are slated to be spent to settle more than 5,000 abuse claims filed against the federal government. Some claimants raised allegations before the Royal Commission on Aboriginal Peoples. These claimants were not cross-examined, there was no corroboration of testimony, and the accused (the government, a church and/or individuals) were not able to supply a defence, yet compensation was paid.

The same year the apology was given, the federal government established the $350 million Aboriginal Healing Foundation (AHF) to fund projects which address the "legacy" of abuse suffered by Aboriginal people in Canada's Indian residential school system.

Not surprising, some native groups claimed it wasn't enough and used the government's acknowledgement of responsibility to launch a myriad of lawsuits. One example is a $12 billion dollar class-action lawsuit against the federal government, seeking compensation for a range of alleged physical, sexual and psychological abuses in Indian schools.

In an attempt to minimize the influence of lawsuits, the federal government unveiled a $1.7 billion Indian Resolution Framework in December 2002. The framework permits the settlement of legitimate claims outside of the courts, saving taxpayers money. However, the new framework isn't cheap. Operational costs to implement the $1.7 billion resolution process are estimated to cost $735 million.

To date, the federal government does not recognize claims arising from alleged cultural genocide. This is because government policy a century ago was well-intentioned by the standards of the day. However, that does not stop Ottawa from spending millions of tax dollars each year on Aboriginal language and cultural programs.

Currently, the Department of Indian Affairs and the Department of Canadian Heritage spends $30 million per year on Aboriginal language and cultural programs. Last December the federal government announced an additional $172.5 million over 10 years for Aboriginal languages and cultures.

Once again, many native groups wanted more. For example, on March 27, 2003 the Ontario Court of Appeal in the Bonaparte decision ruled in favour of 56 primary plaintiffs who attended two Roman Catholic residential schools in Spanish, Ontario, and 189 children of the primary plaintiffs. On appeal, the plaintiffs' lawyers successfully argued that the children of residential school students suffered their own type of harm – to the transmission of their culture and heritage. Essentially, the ruling allows the children and possibly the grandchildren of residential school students to sue over a policy they believe destroyed their language, culture and way of life.

Regrettably, the federal government chose not to appeal the Bonaparte decision, which expands the law from traditionally actionable claims of neglect and abuse to broader political and cultural claims — claims against history itself. In other words, if government could be sued for bad public policy everything would grind to a halt, because virtually any policy has the potential to do harm or look harmful in retrospect.

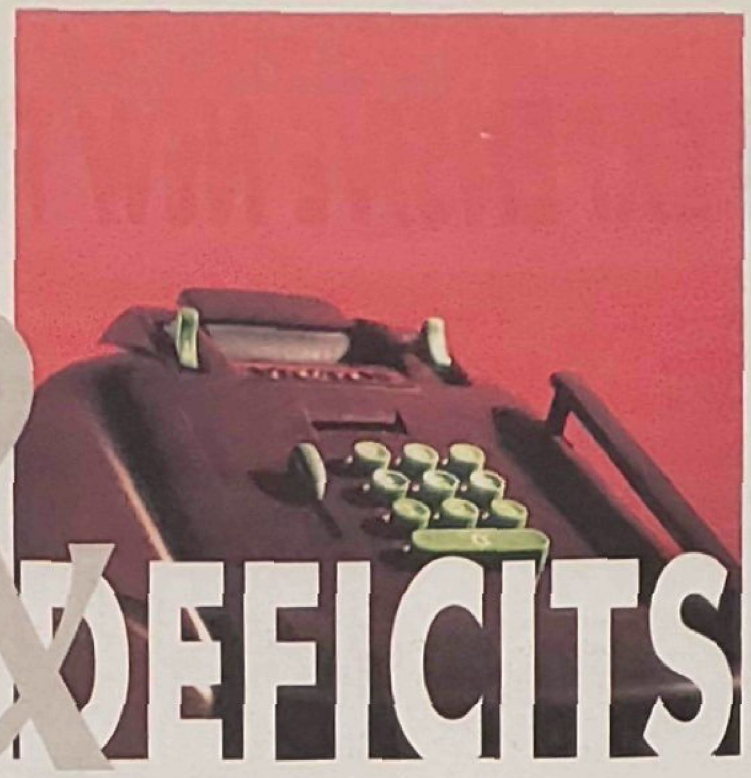
The loss of language and loss of culture are the unfortunate effects of the schools, and of a whole range of policies and historical realities around the European settlement of North America. The consequences should be dealt with through the political process, not the courts. If crimes were committed in the schools - and some were - the victims of the crimes have the same right as any other citizen to seek redress through the courts. Compensation paid for legitimate claims must been subjected to the high standards of proof required by the courts, like all claims.■

CAPC – First year activity Highlights

- The release of *The Lost Century – Moving Aboriginal Policy from the 19th to the 21st Century* position paper. Hundreds of copies were distributed across the country. Several laudable editorials appeared in newspapers. A cross-country tour in its support earned the Centre's director several speaking engagements, editorial board meetings and radio and TV appearances.
- The Centre was the only voice in BC (outside the provincial government) supporting the province's referendum on treaty principles.
- The CTF's in-house legal counsel John Carpay traveled to Ottawa to successfully urge the Federal Court of Appeal to overturn the Treaty 8 decision.
- A presentation was given to the House of Commons Standing Committee on Aboriginal Affairs regarding the *First Nations Governance Act*.
- Many opinion-editorials produced by the Centre were published in major Canadian newspapers. One, which ran in the *Calgary Herald*, spurred a rebuttal from former National Chief Matthew Coon Come of the Assembly of First Nations.■

"In 2001 there were 3808 elected native officials serving on reserve governments at a cost of $101,624,748 in tax free salary and honoraria ... if all Canadians were as thoroughly governed as status Indians, there would be 166,000 federal politicians and Canadians would be paying them approximately $6.2 billion per year, plus travel."

NATIVE FUNDING & DEFICITS



Federal funding for Indian Affairs has been steadily increasing over the years, as has the level of poverty and waste on native reserves. Data obtained by the CTF through Access to Information reveals that enormous increases in federal funding has done little to improve the financial situation of native bands.

During the nine year period of 1992-93 to 2000-01, federal government spending on Indian programs increased by 64% to more than $7 billion annually. According to the Auditor General, 80% of this money is transferred directly to native bands to fund housing, health-care, education and social services.

Nevertheless, of the 630 native bands in Canada almost 30% are in financial difficulty and operating in a deficit. In 1992, 155 bands ran deficits, but by 2000 this number had grown to 188. Over the same period, the cumulative deficit of native bands increased from $132 million to $373 million. This is a massive increase of 182% in just nine years.

Despite the huge increases in the financial resources awarded to native bands in Canada, the financial situation of an increasing number is worsening. If taxpayers ever needed a lesson that gigantic government spending can't solve every problem, this is it. Money isn't the problem, accountability is.

Even though native bands are for the most part publicly funded, Canadian taxpayers cannot obtain the information in native band audits. Once the federal government transfers the money from the federal departments to native bands, the Auditor General of Canada no longer has the authority to audit how and where the money is spent.

Expanding the mandate of the current Auditor General of Canada to include native bands, or establishing a separate native auditor general are ways to ensure accountability and transparency. The audits performed would root out waste, mismanagement, and corruption, and would provide band members and taxpayers at large with an indication of the efficiency, effectiveness and the quality of services being offered on reserves.

Life on reserves will improve if native band governments and politicians are subject to the same kind of regulation, scrutiny, and accountability that protects every other Canadian citizen. Native Canadians on reserves deserve nothing less.

In the year ending March 31, 2001 there were 3,808 elected native officials serving on reserve governments, at a cost of $101,624,748 in tax free salary and honoraria. To put this in perspective, if all Canadians were as thoroughly governed as status Indians, there would be 166,000 federal politicians and Canadians would be paying them approximately $6.2 billion per year, plus travel.

In practical terms, most Chief and council jobs are akin to being the Mayor or councillor of a small to medium sized town, earning only a few thousand dollars a year. However some salaries are excessive. As illustrated in the chart below, the top salary and honoraria in Atlantic Canada is $371,000 - tax free! The top salary and honoraria of a native Chief in Alberta is $159,000 tax-free.■

Did you Know?

Definitions:

Indian – a person who is registered under the *Indian Act*. The Act sets out the requirements to determine who is a status Indian.

Métis – a person of mixed blood, especially of French and North American Indian.

Inuit – an Eskimo of North America who lives above the tree line in Nunavut, the Northwest Territories, Northern Quebec and Labrador.

Aboriginal – anyone who is Indian, Inuit or Métis.

In 2002, registered Indians in Canada totalled 704,851 – less than 3% of the population. Of those, 365,949 lived on reserve, 301,514 lived off-reserve and 23,270 lived on Crown land. Federal spending on Indian Affairs in 2002 was over $7-billion.

There are 629 registered Indian Bands in Canada. The average band membership, including both on- and off-reserve, is 1,120.

CANADIAN Taxpayers FEDERATION *Fighting for taxpayers*

Petition: Abolish the Indian Act

To the Federal Minister of Indian Affairs and Northern Development, Robert Nault:

Treating one ethnic group of Canadians differently from another is wrong both morally and intellectually. However, Canada's *Indian Act* does precisely that.

There are no legal or constitutional barriers to ending the exercise of federal jurisdiction over Indians. Though the federal government has sole jurisdiction, that does not mean that it must exercise it. Therefore, the federal government can abolish the *Indian Act* and policies of segregation at any time.

We the undersigned believe:

To end the practice of segregation and to achieve equality for all Canadians, the *Indian Act* must be phased out over the next 20 years. By 2023 the *Indian Act* should no longer be part of the Canadian landscape.

Name (print) _____ Signature: _____

Address: _____ P.C._____

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Address: _____ P.C._____

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Fax or mail petitions to:(250) 388-3680
Canadian Taxpayers Federation –
Centre for Aboriginal Policy Change
604 – 1207 Douglas Street, Victoria, BC, V8W 2E7
Download more petitions at www.taxpayer.com

Salaries of Indian Band Councillors & Chiefs

Region	Number of elected officials	Salary & honoraria ranges (rounded to the $1,000)	Total salary & honoraria expenses	Average salary & honoraria per elected official	Total actual travel expenses
Atlantic	266	2,000 to 371,000	9,784,020	36,782	2,044,992
QC	209	2,000 to 122,000	6,456,615	30,893	1,216,065
ON	806	0 to 112,000	18,044,824	22,388	4,646,741
MB	415	0 to 96,000	11,952,020	28,800	4,048,946
SK	538	0 to 96,000	15,510,112	28,829	7,282,969
AB	325	8,000 to 159,000	16,524,310	50,844	6,403,685
BC	985	0 to 138,000	19,649,333	19,949	4,356,544
YN	68	2000 to 100,000	1,830,826	26,924	355,894
NWT	196	0 to 9,0000	1,872,688	9,555	399,988
Total	**3808**		**101,624,748**	**28,329**	**30,755,824**